United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Orig w/ affidavit of mailing

76-2079

To be argued by
ALVIN A. SCHALL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-2079

HEYWARD MARTIN,

Appellant,

—against—

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

Appellant Heyward Martin is presently incarcerated in the Federal Penitentiary in Atlanta, Georgia, serving a 25 year sentence, following his conviction on August 15, 1972, after a jury trial, for armed robbery of a post office, in violation of Title 18, United States Code, § 2114. Appellant was also convicted of unlawful possession of stolen mail, in violation of Title 18, United States Code, § 1708. For this offense, he was given a five year sentence, to run concurrently with the sentence imposed under § 2114. Appellant's conviction was affirmed by the United States Court of Appeals for the Second Circuit, without opinion, on March 15, 1973. Appellant now appeals to this Court from an order of the United States District Court for the Eastern District of New York (Costantino, *J.*) entered on June 1, 1976, denying his motion pursuant to Title 28, United States Code, § 2255, to vacate and set aside his judgment of conviction.

In March of 1975, appellant filed a *pro se* 2255 motion in the district court asking that he be resentenced. In support of his motion, appellant alleged that he had been denied an opportunity to speak in his own behalf at the time of his sentencing on August 15, 1972. See Rule 32(a)(1) of the Federal Rules of Criminal Procedure. Appellant also appeared to claim that he had been improperly sentenced because Judge Costantino and defense counsel allegedly failed to understand that when sentencing appellant under § 2114, the court had the option of placing him on probation instead of imposing the mandatory 25 year sentence (A. 92).[1] In a Memorandum and Order filed March 20, 1975, Judge Costantino denied appellant's motion, pointing out that appellant had in fact been given an opportunity to speak in his own behalf at sentencing and noting that the court had understood the sentencing requirements and options under § 2114 (A. 107).

Following the denial of his motion, appellant submitted a *pro se* motion for reconsideration in the district court, again alleging the same two grounds upon which he had relied in his original petition (A. 109). This motion was denied by the court in a Memorandum and Order filed April 24, 1975 (A. 115).

After the denial by the district court of his motion for reconsideration, appellant appealed *pro se* to this Court asking for leave to proceed in *forma pauperis* and for the appointment of counsel. In his papers, appellant relied upon the same claims which he had asserted in the district court. On September 3, 1975, a panel of this Court (Judges Mulligan, Oakes and Gurfein) ordered that the case be remanded "for a hearing on appellant's sentencing and jury charge issues." Appellant's motion

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[1] References preceded by the letter "A" are to pages of appellant's appendix.

for leave to proceed in *forma pauperis* and for the appointment of counsel was denied as moot (A. 118).

On April 13, 1976, a hearing was held before Judge Costantino. At the hearing, appellant renewed his request to be resentenced, and also claimed that his conviction should be vacated because of errors in the judge's charge.[2] Thereafter, on June 1, 1976, the court filed a Memorandum and Order denying again appellant's motion to vacate his sentence. The court also denied the additional motion to vacate the conviction (A. 170).

In arguing now for reversal of the district court's order, appellant makes two arguments: first, that his sentence should be vacated because he was not given an opportunity to speak in his own behalf at the time of sentencing within the meaning of Rule 32(a)(1) of the Federal Rules of Criminal Procedure; and second, that his conviction should be vacated and he should be granted a new trial because of errors in the judge's charge.

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[2] In his original 2255 motion papers appellant made no claim with respect to the judge's charge, and the panel's remand order was unaccompanied by any opinion specifying what "jury charge issues" it meant. Accordingly, on the remand in the district court, attention was focused on those portions of the charge which appellant had quoted in his motion papers, it being argued that the trial judge had incorrectly charged the jury on the meaning of "jeopardy" (one of the elements of the armed robbery offense) and that he had erred in not giving a lesser-included offense charge.

Statement of Facts

A. Appellant's Trial

Testimony at appellant's trial established the following:

At 5:55 P.M., on March 23, 1972, John Conley, a motor vehicle operator employed by the Post Office, and John Carter, a dispatch clerk at the Rochdale Village Postal Station, opened the rear door of the Rochdale Village Postal Station to transport parcels of mail to Conley's waiting truck. An individual subsequently identified as appellant, wearing a letter carrier's Eisenhower jacket and carrying a letter carrier's sack, approached Conley and Carter, withdrew a sawed-off shotgun from the sack he was carrying and forced both men into the interior of the well-lighted post office. A second male individual, unidentified, wielding a .38 caliber pistol, entered behind appellant. Both intruders then escorted the two postal employees to the front of the post office work area, behind the public service counter, where Conley and Carter were forced to lie face down, and their hands and feet were tied behind their backs (T. 14-15a, 38-40).[3]

The robbers next encountered Christianna Jones, a clerical worker, and the station superintendent, Reuben Carter. Mrs. Jones was herded, at gun point, by the unidentified robber to where Conley and John Carter were. She too was then made to lie down and was bound (T. 77-78).

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[3] References preceded by the letter "T" are to the trial transcript. All pages of the transcript reporting sessions of trial where evidence was presented were numbered in order. Thus, the sequentially numbered transcript pages report the Court proceedings of June 15, and 16, 1972, and the proceedings held on the afternoon of Monday, June 19, 1972.

Reuben Carter, at the insistence of appellant, showed appellant where the day's receipts were located and then, at appellant's demand, attempted to open a safe contained in a vault. Although unable to open the safe, Carter was able to comply with appellant's command to open a locked cabinet and to hand over 600 serialized, postal money order blanks. Appellant then demanded to know where the machine used to print the face amount of the money orders was located (this was a Friden print-punch money order machine). Carter was then taken from the vault and tied upon the floor by the second robber, who by that time had obtained a sack containing the registered mail and the day's receipts. The sack was thereupon cut open and its contents removed. The robbers then fled the scene (T. 48-50, 52-53, 55).

An inspection of the premises after the victims were freed disclosed that in addition to the contents of the registered mail sack and the 600 postal money order blanks, the Friden print-punch machine, which was last seen in the hands of one of the robbers by both John Carter and Christianna Jones, and a .38 caliber pistol, last seen after closing hours in an open safe on the floor of the work area, were also missing (T. 55-56).

At trial all four postal employees, John Carter, John Conley, Reuben Carter and Christianna Jones, identified appellant as the shotgun wielding robber (T. 15a, 17, 42-43, 53-55, 79-80).

Also testifying for the Government was John Iachello, a New York City Police Office. Officer Iachello testified as to his arrest of appellant, approximately two hours after the robbery, and his recovery from appellant's car of a quantity of mail identified as having been stolen in the robbery (T. 84-91).

Appellant called two alibi witnesses, Lilly Haigler, his wife, and George Jennette. Haigler and Jennette both testified that they were with appellant from between 5:30 and 6:00 P.M. on March 23, 1972. Jennette further testified that he and appellant left Haigler shortly after 6:00 P.M. and that he remained with appellant until about 6:50 P.M. (T. 132-135).

Appellant took the witness stand in his own behalf. He denied leaving Brooklyn on March 23, 1972, and denied robbing the Rochdale Village Postal Station. Appellant's version of his activity on the day in question coincided with the testimony of Lilly Haigler and George Jennette (T. 145-148).

B. The Hearing of April 13, 1976

John Corbett, the attorney who represented appellant at his trial and on the appeal from his conviction, testified at the April 13th hearing. Mr. Corbett stated that both before and during trial he told appellant of the maximum 25 year penalty under § 2114 (A. 159-160). He stated, however, that he never advised appellant of the theoretical possibility that if convicted of the armed robbery he could receive probation and/or a suspended sentence (A. 164-165). It was also established at the hearing that Mr. Corbett told appellant, at sentencing, that he had the right to speak in his own behalf but that appellant replied that he had nothing to say (A. 156-158).

ARGUMENT

POINT I

Appellant was properly sentenced in accordance with the requirements of Rule 32(a)(1) of the Federal Rules of Criminal Procedure.

Rule 32(a)(1) of the Federal Rules of Criminal Procedure provides, in relevant part, that

> "before imposing sentence the court shall . . . address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment."

Appellant argues that he should be resentenced because his sentencing failed to comply with the above requirements. He claims that although he was given an opportunity to speak, he "was not given an opportunity to speak in mitigation of punishment." Appellant's Brief, p. 11. Appellant bases his argument on the fact that no one told him at, or prior to, his sentencing that following his conviction under § 2114, it would be theoretically possible for him to receive a suspended sentence or probation, instead of a mandatory 25 years incarceration. See *United States* v. *Donovan*, 242 F.2d 61, 64 (2d Cir. 1957). Thus, so the argument goes, appellant erroneously failed to speak up in an effort to mitigate his punishment, believing that to do so would be fruitless.[4] We respectfully submit that appellant's contention is without merit.

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[4] Section 2114 provides for a mandatory 25 year sentence for a defendant who is convicted of armed robbery of a post office. In *United States* v. *Donovan, supra,* it was held that a district court does have the option, when passing sentence under

[Footnote continued on following page]

The answer to appellant's argument is a simple one. The fact is that there was full compliance here with Rule 32(a)(1). The rule simply requires that a defendant be given an opportunity to speak "in his own behalf and to present any information in mitigation of punishment." It commands nothing more. Here, the record is clear, and it is conceded, that appellant *was* given an opportunity to speak, but chose not to do so. He cannot now be heard to complain on the ground that his attorney failed to advise him of the theoretical possibility of probation.[5] Moreover, to grant appellant the relief he seeks would set a precedent which would open the door to a host of meritless post-conviction attacks on sentences. One can easily envision the countless petitions which would be filed alleging that defendants were not given an opportunity to "make a statement" because of communications which allegedly did, or did not, pass between them and their attorneys. Most importantly, however, appellant is squarely barred by law from the relief which he seeks under § 2255.

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§ 2114, to suspend the imposition of sentence and/or to impose a term of probation. The only term of incarceration which can be given, however, is 25 years.

By arguing that his right to speak was illusory, appellant has modified the position which he took in the district court with regard to his sentencing claim. In his original motion, appellant asserted flatly that he had not been given the chance to speak at his sentencing. He also alleged that both the court and his attorney did not realize that he could be given a suspended sentence or probation instead of the mandatory 25 years, *United States* v. *Donovan, supra* (A 92). In view of the fact that the April 13th hearing established that appellant was given an opportunity to speak and that both Judge Costantino and Mr. Corbett understood the sentencing options under § 2114 (A 155-158, 174-175), on appeal appellant has apparently abandoned these two contentions.

[5] In view of the fact that appellant was convicted of armed robbery of a post office, it would seem that the possibility of a sentence of probation was most unlikely.

In *Hill* v. *United States*, 368 U.S. 424, 428 (1962), it was held that failure to follow the formal requirements of Rule 32(a) by not asking a defendant represented by counsel whether he had anything to say in his own behalf was not an error of the character or magnitude cognizable under a writ of habeas corpus. In *Hill*, the Court noted that the failure to address a defendant personally "is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure." 368 U.S. at 428.

In *Machibroda* v. *United States*, 368 U.S. 487 (1962), decided just one month after *Hill*, the Supreme Court was faced with the claim of a 2255 petitioner who had not been asked at the time of sentencing if he had any statements to make in his own behalf. In upholding the Sixth Circuit's affirmance of a district court order denying Machibroda's petition for relief under § 2255, the Court stated, at 368 U.S. 489:

> "For the reasons stated in *Hill* v. *United States ante*, p. 424, we hold that the failure of the District Court specifically to inquire at the time of sentencing whether the petitioner personally wished to make a statement in his own behalf is not of itself an error that can be raised by motion under 28 U.S.C., § 2255 or Rule 35 of the Federal Rules of Criminal Procedure."

Since appellant would not have a cognizable claim even if he had not been given an opportunity to speak, he certainly is entitled to no relief where he was told that he could speak but chose not to do so.

POINT II

The error in the court's charge with respect to the meaning of the word "jeopardy" was harmless.

In charging the jury on the meaning of the word "jeopardy" as it appears in § 2114,[6] the court stated that "to put in jeopardy [means] that by the use of that weapon you expose a person to fear of his life or to a risk of death." (A. 67). In arguing that his conviction should be vacated, appellant contends that this instruction constituted plain error. We disagree. Although the quoted portion of the judge's charge is an incorrect statement of the law, the error was harmless in the context of this case.

In *United States* v. *Donovan*, *supra*, 242 F.2d 61, this Court was called upon to interpret the meaning of the word "jeopardy" appearing in § 2114. The question arose in the context of an appeal from a conviction after a trial, where the judge had charged the jury that the statutory phrase "puts his life in jeopardy" meant "that the [postal employee] must have been put in fear of being killed or in danger of being killed." *id* at 63. The court held that that instruction was incorrect, because it had enabled the jury to find the defendant guilty if it believed that the postal employee had been put in fear of death, even though it also found that his life had not actually been in danger. In support of its decision, the court reasoned that the word "jeopardy" in § 2114 means danger not fear. Accordingly, it was deemed improper for the trial judge, in his charge, to have used the

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[6] Section 2114 provides in relevant part:

> Whoever . . . robs any such person of mail matter, or of any money, or other property of the United States . . .; and if in effecting . . . such robbery he wounds the person having custody of such mail, money, or other property of of the United States, or puts his life in jeopardy by the use of a dangerous weapon . . ."

phrase "in fear of being filled." Significantly, however, the court declined to reverse the judgment of conviction. Writing for the panel which decided the case, Judge Medina found that the error was harmless, in view of the fact that defense counsel had requested the erroneous instruction and that, on the record, there was "no doubt as to the actuality of the danger to the postal employee's life." *id* at 64.

Similar results have been reached in cases involving Title 18, United States Code, § 2113(d), the federal bank robbery statute.[7] Courts have held that it is error for a jury to be charged that it may find a defendant guilty under § 2113(d) if it finds that the actions of the defendant created either fear *or* risk of death. The test is an objective one. There must be an actual risk of death; mere fear is not enough. See, for example, *Morrow* v. *United States*, 408 F.2d 1390 (8th Cir. 1969); *United States* v. *Marshall*, 427 F.2d 434 (2d Cir. 1970). However, in cases where the jury has before it facts sufficient to support a finding that lives actually were in jeopardy, such an incorrect instruction will be dismissed as mere harmless error. In *United States* v. *Marshall*, *supra*, where there was some evidence tending to show that guns used in the bank robbery were not loaded, the court stated:

> "In light of the permissible inference that we have said may be used to find that the guns used during a robbery are loaded, we would be quick to find harmless error here if we were convinced that the jury would have found that the guns were loaded and accordingly, that lives had been 'in jeopardy'."

427 F.2d at 438. See also *United States* v. *Johnson*, 401 F.2d 746 (2d Cir. 1968); *United States* v. *Cady*, 495

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[7] Section 2113(d) provides, in relevant part:
"Whoever, in committing or in attempting to commit, any offense defined in subsections (a) and (b) of this section, . . . puts in jeopardy the life of any person by the use of a dangerous weapon or device . . ."

F.2d 742, 745-747 (8th Cir. 1974); *United States* v. *Stewart*, 513 F.2d 957, 960 (2d Cir. 1975).

The facts of appellant's case are such that the incorrect charge given by the court amounts to nothing more than harmless error. Appellant and his accomplice were both armed and brandished their weapons throughout the robbery.[8] There was no evidence introduced which could have created the slightest doubt that the guns were loaded. Cf. *United States* v. *Marshall, supra.* Based on the evidence and in view of the inference which may be drawn that guns used during a robbery are loaded, *United States* v. *Marshall, supra; United States* v. *Cady, supra; United States* v. *Thomas*, 521 F.2d 76, 81 (8th Cir. 1975), it was entirely proper for the jury to conclude beyond a reasonable doubt that the shotgun carried by appellant during the robbery was loaded and that lives were "in jeopardy." See *Smith* v. *United States*, 284 F.2d 789, 791-792 (5th Cir. 1960); *United States* v. *Roustio*, 455 F.2d 366, 371-372 (7th Cir. 1972); *United States* v. *Waters*, 461 F.2d 248, 251-252 (10th Cir.), *cert. denied, sub nom. Robins* v. *United States*, 409 U.S. 880 (1972). The error in the judge's charge was clearly harmless.

POINT III

The court was not required to charge the jury on the lesser-included offense.

As stated above, appellant was convicted of armed robbery of a post office, in violation of Title 18, United States Code, § 2114, for which he received a sentence of 25 years imprisonment. Section 2114 also makes unarmed postal robbery a crime, as well as unarmed assault with intent to commit postal robbery. Each of these lesser-included offenses carries a 10 year penalty. In the indictment on

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[8] Postal employee John Carter, for example, testified that appellant "opened the door and at that time . . . came through and pushed a shotgun in our faces." (T. 14-15).

which he was tried, appellant was charged only with the aggravated form of robbery. At trial, appellant's counsel specifically rejected an offer by the court of a charge on the lesser-included offense of unarmed robbery (A. 12). Consequently, no such charge was given. Appellant now argues that failure to give the lesser-included offense charge requires reversal of his conviction. The argument is without merit.

The law with respect to charges on lesser-included offenses is clear. In *United States* v. *Sansone*, 380 U.S. 343 (1965), the Supreme Court instructed that a defendant does not have an absolute right to such a charge unless there is a "disputed factual element" which would allow the jury rationally to conclude that the defendant is guilty of the lesser offense, but not the greater offense. *id.* at 349-350. Or, put another way, a defendant is entitled to a lesser-included offense charge only if the evidence before the jury warrants it. *United States* v. *Carroll*, 510 F.2d 507, 509 (2d Cir. 1975); *United States* v. *Marin*, 513 F.2d 974, 977 (2d Cir. 1975). It is clear that it was correct here not to give the lesser-included offense charge, for there was no evidence at all to support a contention that appellant's shotgun was not loaded. Indeed, the whole thrust of the defense in this case was not to contest what happened at the Rochdale post office, but rather to establish through the testimony of appellant and his alibi witnesses that appellant was never in the post office and that the prosecution had the wrong man.[9]

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[9] See defense counsel's summation (A. 29-39).

See also *Hanks* v. *United States*, 388 F.2d 171 (10th Cir.), *cert. denied*, 393 U.S. 863, *rehearing denied*, 393 U.S. 947 (1968), where it was held that a defendant charged only with the greater offense set forth in § 2114 was not entitled to an instruction on the lesser-included offense charge.

Indeed, on the basis of the evidence which was before the jury, we submit that it would have been error if the court had given a lesser-included offense charge. Cf. *United States* v. *Harary*, 457 F.2d 471 (2d Cir. 1973).

Moreover, as noted above, defense counsel specifically rejected the court's offer of a charge on the lesser offense of unarmed robbery. Thus, not only was appellant *not* entitled to the charge which he says he should have gotten, but when the instruction was offered to him, it was turned down. He cannot now be heard to complain. See *United States* v. *Whitaker*, 447 F.2d 314, 317 (D.C. Cir. 1971). Indeed, the rejection of the offer of the lesser-included offense charge reflected a trial strategy fully consistent with appellant's defense that he was not one of the two men who robbed the post office. Cf. *Walker* v. *United States*, 418 F.2d 1116, 1119 (D.C. Cir. 1969). We respectfully submit that appellant's claim should be dismissed as frivolous.

CONCLUSION

The order of the district court dated June 1, 1976, should be affirmed.

Dated: October 26, 1976

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 29th day of October, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Zerin, Cooper & Horlick
26 Court Street
Brooklyn, N.Y. 11242

Evelyn Cohen

Sworn to before me this
29th day of Oct., 1976

Carolyn N. Johnson

CAROLYN N. JOHNSON
Notary Public, State of New York
No. 41-4618288
Qualified in Queens County
Term Expires March 30, 1977